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No. 07-1370

In the Supreme Court of the United States

LONG JOHN SILVER'S, INC.,
Petitioner,

v.

ERIN COLE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented in this case is whether the Court should adopt a new, heightened standard of judicial review under the Federal Arbitration Act, applicable only to the arbitration of federal statutory claims.

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INTRODUCTION

Petitioner Long John Silver's, Inc. ("LJS") asks this Court to grant certiorari to consider whether to adopt an entirely new standard of review applicable to arbitration awards rendered in cases involving federal statutory claims, even though LJS asked neither the district court nor the Fourth Circuit to utilize any standard of review other than the one that has prevailed in the Fourth Circuit for decades.

This Court recently reaffirmed its long-standing commitment to the strong federal policy favoring arbitration, and to the limited judicial review that is a hallmark of that policy, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). Despite this Court's restatement of the traditionally narrow scope of judicial review of arbitration awards, LJS petitions the Court to move in the directly opposite direction by authorizing merits-based judicial review of arbitration awards, in cases involving federal statutory claims.

LJS claims that this Court's decisions in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) justify the about-face, saying that the two cases left questions unanswered concerning the scope of judicial review the Court intended to be applicable to arbitrations involving federal statutory causes of action. Curiously, and in virtually the same breath, LJS also asserts that despite the alleged "absence of guidance by the

Court,"[1] *McMahon* and *Gilmer* nevertheless gave "clear instruction"[2] and "admonition"[3] to the federal trial and appellate courts to employ a heightened standard of review of awards involving statutory claims, up to and including review for mere legal error, and that the Fourth Circuit's decision in this case ignored and violated that purported mandate.

However, nothing in the *McMahon* or *Gilmer* opinions supports a grant of certiorari to review the Fourth Circuit's decision in this case. *McMahon* and *Gilmer* were "front-end" cases deciding whether particular federal statutory claimants could be compelled, pursuant to Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, to resolve their claims in arbitration pursuant to mandatory pre-dispute arbitration agreements. In both cases, the Court rejected the claimants' challenges to the adequacy of the arbitral forum, including challenges based on the alleged insufficiency of judicial review of arbitration awards. This Court held in both cases that while the accepted scope of judicial review "'necessarily is limited, *such review is sufficient* to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32, n. 4 (*quoting from McMahon*, 484 U.S. at 232) (emphasis added). The Fourth Circuit and the district court considered, and carefully adhered to, the lessons of *McMahon* and *Gilmer*.

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[1] LJS Petition for Certiorari ("Pet."), at 19.

[2] *Id.* at 20.

[3] *Id.* at 25.

LJS also attempts to conjure up a split among the federal circuits concerning the appropriate standard of review of arbitration awards concerning statutory claims. The threshold fallacy in LJS's claim of a circuit split is that, when the decisions of the Fifth and District of Columbia Circuits relied on by LJS as evidence of the circuit split are considered in light of later decisions *of those same circuits*, the purported conflict disappears. Moreover, language differences urged by LJS as evidence of a circuit split do not really appear in the various circuits' articulations of the governing *scope of review*, with respect to which there is very little, if any, genuine disagreement. Instead, those language differences emerge in the appellate courts' attempts to explain what constitutes "manifest disregard of the law."

Not only is the purported schism not real; it is also not germane to any "important matter" within the meaning of Supreme Court Rule 10(a) and related jurisprudence, especially in view of the Court's recent *Hall Street v. Mattel* decision. The significance of the historical language differences in articulating what constitutes manifest disregard of the law has been substantially minimized – and rendered much less suitable for *present* certiorari review – by the Court's decision in *Hall Street*, including the Court's express holding that the Section 10 grounds are the exclusive grounds for vacating an award under the FAA, and the Court's related suggestion that manifest disregard of the law may not be a separate or additional ground for vacating an award at all.

Finally, even if the issue presented were certworthy, this case is not an appropriate one in

which to undertake such review. The decisions below correctly recognized that the challenged arbitration award was based primarily on the unique facts and documents presented to the arbitrator, and that there is serious doubt concerning the very existence of the purported "substantive statutory right" that LJS claims was violated by the arbitrator.

STATEMENT OF THE CASE

The arbitration giving rise to LJS's most recent round of judicial review was commenced in December 2003. The Respondents formerly worked as restaurant general managers and/or assistant managers for LJS. They initiated arbitration on behalf of themselves and all similarly-situated LJS managers (the "Class") to recover overtime compensation the Class members were owed, but were not paid, over a period of several years during which Respondents claim LJS misclassified the class members as exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA").

For forty-six of the fifty-two months that the arbitration has been pending, the Class has been embroiled in federal court actions – and a few collateral state court actions – initiated by LJS to vacate two procedural awards rendered by the arbitrator. LJS has either lost or abandoned every round of such review with respect to both awards, but persists even yet in its efforts to undo one aspect of the second of the two challenged awards.

The substantive claims now asserted against LJS in arbitration were first asserted in federal court. In

2001, Kevin Johnson filed a "collective action" lawsuit pursuant to § 16(b) of the FLSA, 29 U.S.C. § 216(b), in the United States District Court for the Middle District of Tennessee, on behalf of himself and all others similarly situated. Johnson's lawsuit claims were identical to the Respondents' claims in arbitration, except that Johnson sought certification of an "opt-in" class described in FLSA Section 16(b).

LJS vigorously opposed certification of an opt-in class, arguing that Mr. Johnson was required to submit his lawsuit claims to arbitration pursuant to a pre-dispute arbitration agreement that he, the Respondents, and all members of the Class had signed as a condition of employment by LJS. That agreement required covered claims to be arbitrated in the AAA, and further provided that the arbitration would be conducted pursuant to the AAA's rules. *See* LJS Real Resolution Program Booklet, page 10; Ct. App. Joint App. at JA084.

LJS succeeded in having Mr. Johnson's lawsuit claims dismissed by the district court in Tennessee, which concluded that the claims were subject to mandatory arbitration before the AAA. *Johnson v. Long John Silver's Rests., Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2005). That decision was affirmed on appeal. 414 F.3d 583 (6th Cir. 2005).

The AAA Rules applicable to class arbitrations provide that the arbitrator will render two "partial final awards" before addressing the merits. The first of these is called a "Clause Construction Award," in which the arbitrator "determine[s] as a threshold matter . . . whether the applicable arbitration clause

permits the arbitration to proceed on behalf of or against a class." AAA Supplementary Rules for Class Arbitrations ("AAA Class Rules"), Rule 3; Pet. App. at 52a-53a. If the arbitrator answers that question in the affirmative, he or she then proceeds to the "class determination" phase, during which the arbitrator decides whether, in fact, to certify a class in the particular case, pursuant to factors delineated in AAA Class Rule 4, Pet. App. at 53a-54a. The product of the class determination phase is a "Class Determination Award." AAA Class Rule 5, Pet. App. at 54a-55a.

In this case, the arbitrator issued a Clause Construction Award on June 15, 2004, in which he ruled that the parties' arbitration agreement permits class arbitration. LJS filed a Motion to Vacate the Clause Construction Award in the United States District Court for the District of South Carolina. On September 15, 2005, the district court dismissed that motion for lack of subject matter jurisdiction. LJS appealed that dismissal to the Fourth Circuit; after the appeal was fully briefed, LJS voluntarily dismissed its appeal.

One of the issues LJS specifically asked the arbitrator to decide during the class determination phase was whether to utilize an opt-out class pursuant to the AAA Class Rules or an opt-in class described in FLSA Section 16(b). The arbitrator issued his Class Determination Award on September 19, 2005, in which he decided to certify the case as a class action on behalf of a class of present and former LJS restaurant general managers and assistant restaurant general managers employed during a specified time period. In response to LJS's request that he choose whether to

utilize an opt-out or opt-in class, the arbitrator decided to utilize the opt-out provisions of the AAA Class Rules.

LJS filed a Motion to Vacate the Class Determination Award in the district court, in which it challenged four separate aspects of that award, including the arbitrator's decision to use an opt-out class. The district court denied the Motion to Vacate on its merits, on all four points. *Long John Silver's Rest., Inc. v. Cole et al.*, 409 F. Supp. 2d 682 (D.S.C. 2006), which is reproduced as Pet. App. B. LJS appealed to the Fourth Circuit, but limited its appeal to the single opt-out vs. opt-in issue. The Fourth Circuit affirmed the district court on the opt-out vs. opt-in issue in a published opinion, *Long John Silver's Restaurants, Inc. v. Cole, et al.*, 514 F.3d 345 (4th Cir. 2008), reproduced as Pet. App. A.

REASONS FOR DENYING THE PETITION

I. The Petitioner Did Not Raise the Issue Presented in the Petition in Either the District Court or the Fourth Circuit.

In its Petition LJS asks the Court to adopt and apply a new, more rigorous standard of review to the Class Determination Award challenged by LJS, relief it did not seek in either of the courts below. A party's failure to seek resolution in the lower courts of an issue raised in a petition for certiorari normally dooms the petition in this Court. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

LJS claims in the Petition that it requested "heightened" review in both of the courts below, and intimates that those requests were equivalent to the relief it seeks in this Court. Pet. at 8, 9, 10, 11, 13, 20. Not so. LJS never requested that either court utilize a new or different standard of review specific to arbitration awards involving statutory claims.

LJS was content to couch all of its arguments below in terms of the traditional and long-standing Fourth Circuit standards for reviewing arbitration awards, and never suggested that those recognized standards were inadequate to provide sufficient review of the subject award. Indeed, LJS's assault on the arbitration award in both lower courts repeatedly and consistently relied upon the Fourth Circuit's decision in *Remmey v. Paine-Webber, Inc.*, 32 F.3d 143 (4th Cir. 1994),[4] a decision it now criticizes as a source of the Fourth Circuit's allegedly too-narrow and legally insufficient standard of review. Pet. at 10.

To be sure, LJS sometimes quoted to both the district court and the Fourth Circuit the oft-cited language from *McMahon* and *Gilmer* that by agreeing to arbitrate a statutory claim a party does not forego the substantive rights afforded by the statute, and that the judicial scrutiny of arbitration awards, though

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[4] *See* Petitioner's 4th Cir. Brief, avail. at 2006 WL 2726265 *25, 35; Petitoner's 4th Cir. Reply Brief, avail. at 2006 WL 2623026 *7; Petitioner's Dist. Ct. Mem. in Supp. of Motion to Vacate Class Determination Award at 8, 10 [Joint Appendix Filed with the Court of Appeals ("JA") 24, 26]; Petitioner's Dist. Ct. Reply in Supp. of Motion to Vacate, at 13 [JA182].

necessarily limited, is sufficient to ensure that arbitrators comply with the requirements of the statute. But LJS's mere incantation of that language from *McMahon* and *Gilmer* is *not* tantamount to a request that the lower courts utilize a different, and broader, scope of review, which is the relief requested and issue presented in the Petition.

LJS suggests in its Petition that the district court *specifically considered and rejected* its purported request that the court apply the same "heightened" standard of review it requests this Court to adopt. Pet. at 10. As support for this claim, LJS quotes the following language from the district court's opinion: "The Court finds no basis in the law for Movants' suggestion that the Court review the arbitrator's award under a more rigorous standard, and the Court declines to undertake such a review here." *See* Dist. Ct. Memorandum Opinion and Order, at 3; Pet. App. B at 19a. While the district court did reject a request from LJS to employ an unprecedented, and more rigorous, standard of review, *it was not the standard for which LJS advocates in this Court.*

In its opening brief to the district court, LJS cited the Fourth Circuit's decision in *Mountaineer Gas Co. v. Oil, Chemical & Atomic Workers Int'l Union*, 76 F.3d 606, 608 (4th Cir. 1996), as authority for the proposition that "[w]hether an arbitrator exceeded the bounds of his authority is a question of law, and therefore is reviewed *de novo*." *See* LJS's Dist. Ct. Memorandum In Support of Motion to Vacate Arbitrator's Class Determination Award, at 19; JA at JA035. However, *Mountaineer Gas* did not so hold; the cited portions of that decision address the standard of

review employed when the Court of Appeals reviews a district court's decision whether to vacate an award, *not* the standard of review employed by the trial court in the first instance.

Respondents initially failed to correct that clear misstatement of the law, prompting LJS not only to repeat the same argument in a later brief, but to stress that Respondents had failed to point out the error,[5] as if Respondents' failure to point out an obvious misstatement of the law somehow effected a change in the law.

This request by LJS for *de novo* review was the "more rigorous standard" the district court rejected in the footnote cited by LJS in the Petition. As stated above, LJS *never* requested that the district court apply the heightened standard of review it asks this Court to adopt for statutory claim arbitration.

Thus, LJS did not raise in either the district court or the Fourth Circuit the issue it attempts to raise here. Hence, LJS failed to preserve that issue for review here.

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[5] LJS Reply in Support of Petitioners' Motion to Vacate Class Determination Award, at 4, n. 9; JA at JA 173.

II. The Fourth Circuit's Decision Declining to Upset the Arbitrator's Class Determination Award Does Not Conflict with any Decision of this Court, including *McMahon* and *Gilmer*.

LJS complains that the decision below was flawed because it contravened this Court's decisions in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). No such conflict exists; indeed, the Fourth Circuit's decision was both informed by, and in full accord with, those two cases. LJS's additional claim that the Fourth Circuit's opinion "made no mention of" and did not "attempt to reconcile" *McMahon* and *Gilmer*, Pet. at 13, is demonstrably false.

A. Nothing in This Court's *McMahon* or *Gilmer* Decisions, or in Any More Recent Pronouncements, Suggests the Need for More Stringent Review of Arbitration Awards Involving Federal Statutory Claims.

LJS's argument that the Fourth Circuit opinion in this case conflicts with *McMahon* and *Gilmer* is based entirely on the suggestion that these two cases presaged, and even mandated, a "heightened" standard of review of arbitration awards in cases involving federal statutory claims. While LJS poses the question presented simply as "what degree of 'judicial scrutiny . . . is sufficient to ensure that arbitrators comply with the requirements of the statute,'" Pet. at i, that open-ended statement of the issue does not mask exactly what level of scrutiny LJS

is asking the Court to adopt. The Petition makes abundantly clear that the new and heightened standard LJS would have the Court declare would require the judiciary to scrutinize awards for erroneous interpretation and application of the federal statutes, act to ensure broad "compliance" with statutes (presumably, every provision of a statute), and review arbitration awards for mere "legal error." Pet. at 3, 10, 13, 14, 17, 25.

The threshold problem with LJS's argument that the Fourth Circuit violated *McMahon* and *Gilmer* is that neither opinion actually calls for the application of a new or different standard of review in statutory claim arbitration. Both cases involved the arbitration of federal statutory claims, and both cases were decided after decades of jurisprudence in which both this Court and the courts of appeals had articulated the traditional, limited scope of judicial review of arbitration awards. The two cases state specifically that while the accepted scope of judicial review is "'necessarily is limited, *such review is sufficient* to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32, n. 4 (*quoting from McMahon*, 484 U.S. at 232) (emphasis added). They neither state nor imply, as LJS suggests, that judicial review "must be" sufficient, implying that something more than the existing scope of review was contemplated or required.

Thus, far from creating unanswered questions concerning the necessary scope of review of arbitral awards related to statutory claims, the Court in *McMahon* and *Gilmer*, which were decided following decades of appellate jurisprudence establishing and

defining the applicable standard of review of which the Court was undoubtedly mindful, expressed confidence that the established standard of judicial scrutiny of arbitral awards "is sufficient" for purposes of the statutory claims the Court permitted to go to arbitration. Those cases certainly conveyed the message that particular arbitral forums must include sufficient safeguards to ensure that the substantive statutory rights of claimants could be effectively vindicated in those forums, but the Court clearly stated that the then-existing and acknowledged scope of review was sufficient to satisfy that requirement. Nothing in the opinions suggests that a separate or heightened level of judicial review should or would be required in the arbitration of statutory causes of action.

Nor does either *McMahon* or *Gilmer* suggest that *all* statutory requirements must be followed to the letter in arbitration, to the same extent as they would be in court; any such rule would effectively preclude the arbitration of statutory claims. Instead, the cases uphold the use of an arbitration forum and agreed-upon arbitral procedures "so long as the prospective litigant *effectively may vindicate* [his or her] statutory cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). *McMahon* and *Gilmer* never state or imply that wholesale incorporation of statutory procedures and other requirements are essential to the effective vindication of the statutory rights of claimants, or to ensure that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the

statute." *Gilmer*, 500 U.S. at 26; *McMahon*, 482 U.S. at 229; *Mitsubishi*, 473 U.S. at 628.

There is no inconsistency between this Court's insistence that an arbitral forum adequately protect substantive statutory rights, and its present-tense expression in *McMahon* and *Gilmer* of confidence that the then-existing scope of judicial review was adequate in statutory claim arbitration, especially when the two messages are considered in the context of the adjudicative bargain made by parties to arbitration agreements. As the Court observed in *Mitsubishi* and *Gilmer*, "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31, *quoting from Mitsubishi*, 473 U.S. at 628.

Hence, the Court has already held that even in the context of statutory claim arbitration, limited judicial review is an inherent, and wholly acceptable, trade off made by the parties in exchange for a simpler, quicker and less formal resolution of their disputes. *Gilmer* itself considered the sufficiency of established judicial review in the section of the opinion[6] in which the Court disposes of Gilmer's "host of challenges to the adequacy of arbitration procedures." 500 U.S. at 30. The Court evaluated Gilmer's challenge to the sufficiency of established judicial review the same way it evaluated his challenges to the fairness of arbitration panels, limitations on discovery in

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[6] Section B of the opinion, commencing 500 U.S. at 30.

arbitration, and arbitrators' frequent failure to issue written opinions.[7]

The Court determined that none of the various procedural limitations inherent in arbitration – including limited judicial review – made the process fundamentally unfair, or rendered the arbitral forum incapable of effectively vindicating substantive statutory rights. Curiously, LJS suggests that the Court's *approval* of one such procedural limitation – limited judicial review – somehow impliedly mandated a going-forward change in or elimination of the approved limitation.

This Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), confirms the view that the limited review of statutory claim arbitration remains sufficient to satisfy all requirements of the *Gilmer* case. *Hall Street* states that the three sections of the FAA dealing with post-award enforcement – Sections 9, 10 and 11 – are properly read "as substantiating a national policy favoring arbitration with just the limited review

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[7] Of special significance to this case is the Court's inclusion, in its discussion of the alleged inadequacy of "arbitration procedure," of Gilmer's contention that arbitration forums might not permit class actions. Clearly, the Court considered the availability *vel non* of class actions in arbitration to be an issue involving arbitration *procedure*, rather than as one implicating substantive statutory rights. The *Gilmer* court undoubtedly would have reached the same conclusion with respect to the opt-out vs. opt-in issue decided by the arbitrator in this case, which is a subsidiary class action issue.

needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 1405.

Respondents are well aware that *Hall Street* did not involve the arbitration of federal statutory claims. Nevertheless, *Hall Street* is a powerful reminder that the strong federal policy favoring arbitration – a policy that underlay the *Gilmer* court's determination that limited judicial review was acceptable in statutory claim arbitration – is as strong today as in 1991.

Hall Street's express holding that the grounds for vacating arbitration awards contained in FAA Section 10 are the exclusive grounds authorized by that Act suggests that the Court would be loath to consider necessary any expansion of the historically applicable standard of review – especially an expansion of the magnitude proposed by LJS in the Petition. This is even clearer because of the majority's emphasis that the FAA Sections 10 and 11, 9 U.S.C. §§ 10, 11, grounds for vacating arbitration awards all involve serious arbitrator misconduct.

> Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted; the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits."

128 S. Ct. at 1404. Because of the egregious nature of conduct necessary to permit vacatur of an award, the Court rejected the petitioner's attempt to "expand the stated grounds to the point of evidentiary and legal review generally." *Id.*

The majority in *Hall Street* also decried the petitioner's attempt to imply non-fault based grounds into the governing language of the FAA, or a more rigorous level of judicial review than the language of the FAA permits:

> Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "render informal arbitration merely a prelude to a more cumbersome and time consuming judicial review process," (citations omitted) and bring arbitration theory to grief in post-arbitration process.

128 S. Ct. at 1405.

LJS may say that the foregoing words, evidencing a continuing conviction in this Court that limited judicial review is necessary to advance the national pro-arbitration policy, were not uttered in a statutory arbitration case. The problem with that argument is that the just quoted words strongly echo the declaration in *Gilmer* that limited judicial review in

statutory claim arbitration is an acceptable – indeed necessary – trade off for "the simplicity, informality and expedition of arbitration." 500 U.S. at 31. There is simply no reason to believe that there has been any erosion since the 1991 *Gilmer* decision of the Court's conviction as to the propriety of historically limited judicial review of arbitration awards rendered in statutory claim arbitration.

B. Petitioner's Claim That the Fourth Circuit Failed to Consider *McMahon* or *Gilmer* is Not True, as the Decision Below Plainly Reveals.

LJS introduces its "Reasons for Granting the Writ" with the following statement: "[T]he court of appeals made no mention of this Court's statements in *McMahon* and *Gilmer*, nor did it attempt to reconcile them with its own explicit refusal to decide whether the arbitrator had properly interpreted and applied the FLSA." Pet. at 13. Both clauses of the quoted statement are untrue.

Three pages of the Fourth Circuit's opinion are devoted to a discussion and analysis of *Gilmer*. *See* Pet. App. A at 9a-11a. Although *McMahon* is not mentioned by name, the Fourth Circuit cites to *Gilmer* text that in turn quotes *McMahon*, and more importantly, the court thoughtfully analyzes the test announced and employed in both *McMahon* and *Gilmer* for determining what alleged rights constitute "substantive statutory rights" that must be effectively vindicated in arbitration.

According to *McMahon* and *Gilmer* a party will be deemed to have submitted purported statutory rights to resolution according to arbitral procedures "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," *Gilmer*, 500 U.S. at 27 (*citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Such preclusion must be "discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id.*, *citing McMahon*, 422 U.S. at 227.

The Fourth Circuit concluded, as did the district court, that LJS failed to carry its burden of satisfying the *McMahon / Gilmer* test for establishing that the opt-in provision of FLSA Section 16(b) was a substantive statutory right that could not be waived by the parties' agreement to use the opt-out procedure contained in the AAA's class arbitration rules. The Fourth Circuit said: "Put simply, it is far from clear that the 'opt-in' aspect of the § 16(b) provision is such a nonwaivable substantive right."

LJS may disagree with the Fourth Circuit's conclusion. But it cannot in good faith claim that the Fourth Circuit failed to consider the lessons of *McMahon* and *Gilmer* in reaching that conclusion.

III. This Case Does Not Implicate any Genuine Circuit Split.

A. The Circuit Split Asserted by Petitioner Does Not Exist.

LJS's claim that "the circuits have fundamentally split over the appropriate standard of review" of arbitral awards involving federal statutory claims is based on a contention that the Fifth and District of Columbia Circuits apply a different *standard of review* than the Fourth, Second and Eleventh Circuits, and that this Court must enter the breach to resolve that conflict. The purported discord is the product, says LJS, of "absence of guidance by the Court," as a result of which "the lower courts have fashioned their own diverse – and inconsistent – doctrines." Pet. at 19.

LJS claims that the standard of review in the Fourth, Second and Eleventh Circuits is so deferential that those courts only permit arbitration awards to be set aside on "manifest disregard" grounds when there is a showing that the arbitrator *willfully* declined to follow law that the arbitrator acknowledged to be controlling. LJS also complains that those courts accord equal deference to awards entered with respect to federal statutory claims as they do in other types of arbitration.

According to LJS, the Fifth and District of Columbia Circuits operate differently, employing a "heightened" standard of review in cases involving statutory claims than in other types of arbitration. That heightened standard of review ostensibly flows from perceived mandates issued by this Court in

McMahon and *Gilmer* that reviewing courts in statutory claim arbitration must apply more stringent review than in other types of arbitration, to insure "arbitral compliance with statutory requirements." Pet. at 22.[8]

A closer examination of the cases which LJS holds up as establishing the circuit split reveals that there is no meaningful disagreement among the circuits concerning the *standard of review* to be applied to arbitral awards involving statutory claims. The differences arise in how the various courts define what constitutes a particular *ground* for vacating awards, that ground being manifest disregard of the law.

Indeed, an examination of the very cases upon which LJS builds its claim that the circuits are in conflict shows that the distinction between them and other circuits was not the standard of review itself, but only with respect to what constituted a manifest disregard of the law in the context of statutory claim arbitration. LJS cites *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997) and *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999) as the primary cases from the District of Columbia and Fifth Circuits that purportedly exemplify those circuits' split from the Fourth, Second and Eleventh Circuits.

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[8] As shown in Section II *supra*, this premise is erroneous, because *McMahon* and *Gilmer* actually only require arbitral forums to afford "effective vindication" of "substantive statutory rights" (not literal or identical compliance with *all* statutory requirements, substantive or otherwise).

Cole was a "front-end case" – deciding whether the court would enforce pre-dispute mandatory arbitration agreements required to be executed by employees as a condition of employment. The D.C. Circuit analyzed a number of objections lodged by the plaintiff to having to resolve his Title VII claims in such an arbitration, including several challenges to various aspects of the arbitration process. In addressing the plaintiffs' arguments concerning the level of judicial review of arbitration awards, the court acknowledged the FAA Section 10 grounds for vacating an award, but pronounced them "not exclusive," 105 F.3d at 1486, and identified manifest disregard of the law as an additional ground. The court went on to say that the "assumptions" of the *Gilmer* court are only valid if "judicial review *under the 'manifest disregard of the law'* standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d at 1487 (emphasis added).

Cole was decided more than eleven years ago, and any notion that the D.C. Circuit, on the strength of *Cole*, applies a wholly different standard of review in statutory claim arbitration has been eliminated by later decisions of the same court. In at least two cases, *both of which involved the arbitration of statutory claims*, the D.C. Circuit described the requirements for proving manifest disregard of the law in the same terms traditionally employed in the Fourth, Second and Eleventh Circuits.

In *LaPrade v. Kidder, Peabody & Co.*, 246 F.3d 702 (D.C. Cir. 2001), the plaintiff asserted several claims against her former employer, including violations of Title VII and the Federal Equal Pay Act. The plaintiff

had been compelled to arbitrate her claims, and she went to court to try to vacate a portion of the resulting award, alleging manifest disregard of the law. In evaluating her challenge to the award, the court stated as follows:

> Manifest disregard of the law 'means more than error or misunderstanding with respect to the law.' (citations omitted) Consequently, to modify or vacate an award on this ground, a court must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.

246 F.3d at 706. The authorities cited by the D.C. Circuit in support of the foregoing quoted language included a *Second Circuit* case, *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997).

Similarly, in the more recent case of *Kurke v. Oscar Gruss and Son, Inc.*, 454 F.3d 350 (D.C. Cir. 2006), which involved an arbitration of claims that included alleged violations of the Securities Exchange Act, the court said:

> "Manifest disregard," however, is an extremely narrow standard of review. It "means much more than failure to apply the correct law." (citation omitted) Rather, to vacate an award under that standard, we "'must find that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether[,] and (2) the law ignored by the arbitrators was

> well defined, explicit, and clearly applicable to the case.'"

454 F.3d at 354 (citing *La Prade* and *DiRussa*).

Hence, LJS's claim that *Cole v. Burns International Security Services* puts the District of Columbia Circuit at odds with any other circuits, including the Fourth Circuit in this case, is groundless. As the later D.C. Circuit cases make clear, that court's rules concerning the proper scope of review, as well as its articulation of the requirements for proving manifest disregard, are wholly in line with those of the circuits LJS claims to conflict with the D.C. Circuit, even as regards the review of awards rendered in statutory claim arbitration. Indeed, the D.C. Circuit has specifically embraced the one aspect of Fourth, Second and Eleventh Circuit jurisprudence which LJS most vehemently opposes – the requirement that an arbitrator must *know of* the allegedly "disregarded" law and of its application to the arbitration under review, before a court can vacate for manifest disregard.

The Fifth Circuit case relied upon by LJS is *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999). The actual holding of *Williams*, insofar as the review of arbitration awards was implicated, was both narrow and unremarkable; the case held that in arbitration cases involving alleged violations of federal statutes, awards should be reviewed for manifest disregard of the law, and that the presence or absence of manifest disregard should be determined "in light of the bases underlying [this] Court's *Gilmer*-type cases." 197 F.3d at 762. The

Williams opinion does not state that a particular standard or level of review should apply, merely suggesting that reviewing courts be informed by *Gilmer*'s concern that the forum permit the effective vindication of substantive statutory rights.

Contrary to the suggestion of LJS, *Williams* did not announce, or purport to require, any different standard of review than that which obtained in any other circuit. A later Fifth Circuit case, involving the arbitration of ERISA claims, describes the applicable standard of review in traditionally limited fashion, noting that reviewing courts were to take an "extremely deferential" view of an arbitrator's award, and that such review is "extraordinarily narrow." *Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 352 (5th Cir. 2004).[9] The court added:

> [M]anifest disregard for the law "means more than mere error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing

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[9] *Kergosien* was also decided after the other Fifth Circuit case relied on by LJS as putting the Fifth Circuit in conflict with the Fourth, Second and Eleventh Circuits, *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004).

> principle but decides to ignore or pay no attention to it."

390 F.2d at 355 (citation omitted).

Accordingly, any circuit conflict previously suggested by *Cole* or *Williams* has been eliminated by subsequent decisions of the District of Columbia and Fifth Circuits. No real conflict in the circuits has been shown by Petitioner.

B. Semantic Differences in Particular Courts' Descriptions of Manifest Disregard Do Not Establish a Certworthy Circuit Split.

It is clear from the foregoing discussion that the language differences among the circuits do *not* evidence a "split" with respect to the standard of review applicable to statutory awards. They are, at most, minor variations in defining what constitutes manifest disregard of the law. Such miniscule differences do not constitute a legitimate basis for granting certiorari, which "will only be granted for compelling reasons."[10]

Stated differently, all of the cases discussed by LJS – on both sides of the purported circuit conflict – recognized that manifest disregard was a ground for vacating arbitration awards of statutory claims, and merely differed somewhat as to the definition of manifest disregard. If one side or the other of such a "conflict" is thought to be wrong, then nothing more

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[10] Supreme Court Rule 10.

has been shown than a "misapplication of a properly stated rule of law" by the erroneous side, which is historically, and by rule of court,[11] rarely a sufficient basis for exercise of the Court's certiorari jurisdiction.

As the Court is well aware, the circuits for decades have employed divergent language to explain what constitutes "manifest disregard of the law" within the meaning of the Court's dictum in *Wilko v. Swann*, 346 U.S. 427 (1953), but those varying articulations have always been more about semantic differences than substantive disagreement among the circuits. The Court has not seen fit before now to reconcile those semantic differences, and the instant case provides no additional or better justification for doing so. Indeed, in light of the Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), there is likely less reason for the Court to undertake that mission now than ever before.

The Court's express holding in *Hall Street* that the Section 10 grounds are the exclusive grounds for vacating an award under the FAA, and the Court's related suggestion that manifest disregard of the law *may not be a separate or additional ground for vacating an award at all*, call into question the current importance of any circuit split thought to exist. With the status of manifest disregard "up in the air," there is even less reason for this Court to undertake a reconciliation of conflicting definitions of what constitutes manifest disregard.

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[11] *Id.*

IV. Even Assuming the Question Presented Were Certworthy, This Would Not be an Appropriate Case for Consideration of the Question.

As demonstrated above, this case does not implicate any conflict with the decisions of this Court or among the circuits. But even if the question did implicate a certworthy conflict, this case would be an inappropriate vehicle for exploring the question presented.

A. The Arbitrator's Award and the Lower Courts' Decisions Not to Disturb that Award are Fact- and Document-Specific.

The decision of the Fourth Circuit, like the district court's ruling and the arbitrator's award that preceded Fourth Circuit review, are primarily the products of the unique facts and circumstances of this case, the combination of which is unlikely to present itself in future federal court review proceedings. LJS presents an abstract issue for review in its Petition, but the disposition of this matter at every prior level turned on the particular facts, relevant documents, and procedural history of this case.

LJS attempts to skirt that problem by claiming the arbitrator's "refusal to apply" the opt-in requirement of FLSA Section 16(b) was "based solely on the fact that the parties had agreed to arbitrate." Pet. at 12. Not so. A host of factors prompted the arbitrator's decision to employ the opt-out procedure required by the Rules of American Arbitration Association ("AAA"),

rather than the opt-in provision contained in Section 16(b).

The award and the cases below were based substantially on the language of the parties' arbitration agreement. It is undisputed that the pre-dispute arbitration agreement that LJS required job applicants to sign specifically provided that arbitrations would be conducted pursuant to the AAA's rules. *See* LJS Real Resolution Program Booklet, page 10; JA at JA084. At the time the subject arbitration was commenced, the AAA Rules included its "Supplementary Rules for Class Arbitrations," which are reproduced in Appendix D to the Petition. The first sentence of those Supplementary Rules states as follows: "These Supplementary Rules for Class Arbitrations ("Supplementary Rules") shall apply to *any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association ("AAA") where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules.*" Pet. App. D at 51a (emphasis added).

Thus, the very rules that the parties chose to govern their future arbitrations provided that class claims or purported class claims would be governed by the Supplementary Class Rules. It is also undisputed that the AAA's Supplementary Class Rules specifically call for the use of opt-out class procedures, similar to those contained in Fed. R. Civ. P. 23. *See, e.g.*, Supplementary Rules 5(c) and 6(b)(5) (Pet. App. D at 55a-56a).

The arbitrator in this case *did not*, as LJS suggests, choose to utilize the AAA's opt-out procedure simply because the parties had "agreed to arbitrate." Instead, the arbitrator construed the arbitration agreement and specifically (and correctly) found that the parties' contractual choice to arbitrate by AAA's Rules included an agreement to utilize the Supplementary Class Rules, including their opt-out procedures.

The arbitrator also based his decision on the procedural history of the arbitration itself, and of the *Johnson* case[12] in which the Class claims asserted in the arbitration were initially pursued. The arbitrator stated that LJS's prior rejection of the FLSA opt-in procedures in *Johnson* was an additional factor favoring utilization of the AAA out-out procedures. Class Determination Award, Pet. App. C at 33a-34a. The arbitrator also observed as follows:

> Had this case been permitted to proceed as a collective action in Johnson, these issues [opt-in vs. opt-out] would not have arisen. By invoking their contractual rights, the parties have submitted to the procedural requirements of the contract. Critically [LJS's] pretrial maneuverings in Johnson and this arbitration have resulted in protracted delays which would now create a fundamental unfairness by the opt-in procedure which, as noted, would significantly reduce the class population in derogation of fundamental objectives.

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[12] See discussion at 4-5, *supra*.

> [I]t has been the endless procedural machinations first in Johnson and now in this arbitration which have acted to jeopardize numerous potentially legitimate claims. To some extent, it is the very procedural history of this case which has rendered ineffective the opt-in procedures of the FLSA. Equity is better served by preserving the rights of potential claimants who have been "sidelined" during the progress of this case.

Id. at 35a-36a.

Hence, the arbitrator's decision to utilize the opt-out provisions of the AAA Rules was based not only on his finding that the parties' contract called for the use of those rules; it was substantially driven by equitable considerations relating to LJS's prior litigation conduct, and the potential adverse impact that conduct would have on Class members' claims. Both the district court, Dist. Ct. Mem. Opinion and Order, Pet. App. B at 26a-27a, and the Fourth Circuit found that the arbitrator's consideration of equitable factors was entirely proper and appropriate. The Fourth Circuit said: "In this regard, we agree with the district court that LJS's assertion [that the arbitrator was simply advancing his own "personal notions of right and wrong"] is contradicted by the fact that the arbitrator relied on settled principles in support of his reliance on equity,[13] *and by the provision of the arbitration agreement empowering the arbitrator to 'award any*

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[13] *Gilmer* itself held that arbitrators "have the power to fashion equitable relief." 500 U.S. at 32.

relief which a court could award.' Fourth Circuit Opinion, Pet. App. A. at 15a-16a, n. 9 (*quoting from* Dist. Ct. Opinion, Pet. App. B at 27a) (emphasis added).

B. The Linchpin of LJS's Petition – Its Claim that the FLSA's Written Consent Requirement Constitutes a Substantive Statutory Right Within the Meaning of *McMahon* and *Gilmer* – Lacks any Legal Support.

An additional reason why this case is an inappropriate vehicle for decision of the issue presented by LJS is that, as the Petition itself acknowledges, the "heightened" standard of review for which it argues would only apply to awards that are alleged to impinge on substantive statutory rights. LJS's argument that this Court should grant certiorari depends *entirely* on LJS first establishing that the "written consent" or "opt-in" provision contained in FLSA Section 16(b) constitutes a substantive statutory right within the meaning of *McMahon* and *Gilmer* because it is only such rights that are required to be effectively vindicated pursuant to those two cases.

There is no governing authority to establish that *sine qua non* to LJS's entitlement to certiorari review. When the arbitrator rendered his Class Determination Award, no court, adjudicative board, or administrative agency (including the Department of Labor) had ever held, opined, or even argued (to the knowledge of Respondents) that the "opt-in" requirement contained in FLSA Section 16(b) constituted a substantive statutory right.

On its face, the written consent or opt-in, requirement appears to be purely a *procedural limitation* on participation in litigation. Case law prior to issuance of the Class Determination Award confirmed this status. A clear indication of whether the opt-in requirement is procedural or substantive can be found in how Congress has chosen to utilize it. Whereas the substantive provisions of the FLSA are unique, extending protections to employees different from rights accorded under other federal civil rights acts such as the Age Discrimination in Employment Act, Title VII, and the Equal Pay Act, Congress has imported the FLSA's opt-in mechanism into substantively different acts such as the ADEA and the EPA. As this Court observed in *Lorrilard v. Pons*, 434 U.S. 575, 584-85 (1978), "rather than adopting the procedures of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedures."

Several courts of appeals have specifically described the entire FLSA collective action mechanism, of which the opt-in provision is but a part, to be procedural. "Among the FLSA procedures incorporated into the ADEA is that which permits bringing a collective action." *Sperling v. Hoffman-LaRoche, Inc.*, 862 F.2d 439, 444 (3d Cir. 1988), *aff'd* 493 U.S. 165 (1989). *See, also Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016 (7th Cir. 1988) (referring to the "FLSA-based litigation process" and the "'opt-in' provision of the FLSA" as "litigation procedure").

Gilmer itself specifically held that *the entire collective action process* of FLSA Section 16(b) was

non-substantive and waivable in favor of contrary arbitration procedures. 500 U.S. at 32. The Fourth Circuit so held prior to the arbitrator's Class Determination Award and the district court decision denying LJS's motion to vacate. *Atkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).[14]

As the Fourth Circuit said in this case, "[i]f the right to initiate a collective action can be waived, as the Claimants assert, it may be inferred that an 'opt-in' procedure relating to any such right (here, the FLSA § 16(b) provision) can also be waived." Ct. App. Opinion, Pet. App. A at 11a. Both the district court and the Fourth Circuit recognized that LJS had not provided the arbitrator with any authority requiring the use of FLSA Section 16(b)'s opt-in requirement even though the parties had agreed in their arbitration clause to utilize an arbitral forum's rules that specifically direct the use of an opt-out class.

Both courts below expressed serious doubt that the opt-in requirement constitutes a substantive right.[15] If

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[14] Indeed, in one of the cases urged by LJS as evidence of a circuit split, the Fifth Circuit expressly rejected the FLSA plaintiffs' "claim that their inability to proceed collectively [in arbitration] deprives them of substantive rights available under the FLSA." *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004). The *Carter* court distinguished the collective action right from the Plaintiffs' right to recover attorneys' fees, which it impliedly found to constitute a substantive statutory right. *Id.* at 299, n.1.

[15] Court of Appeals Opinion, Pet. App. A at 11a, n.8. Dist. Ct. Memorandum Opinion and Order, Pet. App. B at 22a. For the

the Court were inclined to take up the question presented in LJS's Petition, it should be taken up in a case where substantive statutory rights are *clearly* implicated, and the Court's resolution of the issue would be outcome determinative. This is not that case.

LJS attempts to bolster its unpersuasive argument that the written consent requirement is substantive by arguing that it is "impossible to apply the FLSA statute of limitations without the written consent requirement." Pet. at 30. In most cases, there is certainly a connection between the running of the statute of limitations and the date of a suit plaintiff files his or her written consent to join the action.

In arguing that this case is an appropriate vehicle for deciding the question presented in the Petition, LJS states: "The arbitrator in this case apparently assumed that the statute of limitations for absent class members of the 'opt out' class he certified would cease to run at the time the original arbitration proceeding was filed. That assumption is contradicted by the unambiguous language of 29 U.S.C. § 256." *Id.*

LJS knows there was no such "assumption" by the arbitrator in this case. LJS knows that in December 2001, LJS entered into a Stipulation for Stay and Tolling Agreement in the *Johnson* litigation which the

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record, Respondents do not even consider that issue a close call, for the reasons set forth above in Section IV.B.

arbitrator *expressly* (and correctly)[16] determined to apply to the arbitral claims of the Respondents and the claims of the arbitral Class. Arbitrator's Class Determination Partial Final Award, Pet. App. C at 36a-39a. Because there is no issue in this case concerning the impact of the FLSA's written consent requirement on the statute of limitations, this case is an even more inappropriate vehicle for consideration of the question presented in the Petition, even if it were otherwise deemed certworthy.

C. Even if Substantive Rights are Implicated by the Section 16(b) Written Consent Requirement, LJS has Adduced No Evidence that Such Rights Were Not Effectively Vindicated by the Opt-Out Class Procedures Used in this Arbitration.

Although LJS has failed to establish the status of the opt-in or written consent requirement as a substantive federal statutory right, it would not be *enough* for LJS to do so, as LJS seems to contend. *Gilmer* makes clear that arbitrators and arbitral forums do not have to enforce such rights in precisely the same way they are enforced in court.

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[16] LJS unsuccessfully challenged this aspect of the Class Determination Award in its district court Motion to Vacate. See District Court Memorandum Opinion and Order, Pet. App. B at 27a, n.3. No issue was raised in the Fourth Circuit concerning applicable of the tolling agreement, so this issue has been conclusively resolved against LJS. In this case, the statute of limitations applicable to the Respondents' and Class claims has been tolled since December 2001.

Instead, *Gilmer* requires only that substantive statutory rights be "effectively vindicated" in the arbitral forum. 500 U.S. at 28. *Mitsubishi Motors, Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1991). The record in this case is devoid of any evidence showing, or even suggesting, that the opt-out procedure employed in the arbitration failed to "effectively vindicate" any alleged substantive right not to participate in the arbitration without giving one's written consent.

Indeed, at no time during the course of the lengthy judicial review undertaken by LJS has it ever suggested or argued why the extensive class protections built into the AAA Class Rules fail to effectively vindicate the asserted right. Those rules include the following requirements: that the arbitrator "direct that class members be provided the best notice practicable under the circumstances"; that such notice "be given to all members who can be identified through reasonable effort"; that the nature of the arbitration and the arbitral claims be explained to the class members; that class members have the right to enter an appearance through their own counsel if desired; that class members be informed how to elect to be excluded from the class, and that any class member requesting exclusion will be excluded; and that the binding effect of a class judgment be explained to class members. AAA Class Arbitration Rule 6; Pet. App. D at 56a-57a.

This Court exercises its certiorari jurisdiction to decide important *issues*, but it reserves the exercise of that jurisdiction for cases in which the issues decided will be relevant and outcome-determinative in the

underlying case or controversy. There is no proof – nor indeed any argument – that the class protections provided for under the AAA Class Rules and utilized in this arbitration failed to vindicate the purported opt-in "right" for which LJS argues. In the absence of such proof, this case is an inappropriate vehicle for deciding the question presented in the Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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